84-1611

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ALEXANDER L. STEVAS,
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1985

FREDERICK LANCASTER,

Petitioner

vs.

PEOPLE OF THE STATE OF
ILLINOIS

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DENNIS M. DOHERTY
35 E. Wacker Dr.
Chicago, Illinois 60601
312/580-0935

FREDERICK F. COHN
35 E. Wacker Dr.
Chicago, Illinois 60601
312/641-0692

Counsel for Petitioner

25 pp

(a)

QUESTION PRESENTED FOR REVIEW

I.

Whether ineffective assistance of counsel at sentencing is a constitutional deprivation cognizable in post-conviction proceedings, where defendant's due process right to be sentenced on the basis of erroneous information was violated.

(b)

LIST OF PARTIES IN THE COURT BELOW

Frederick Lancaster, petitioner, was represented by attorney Dennis M. Doherty.

DENNIS M. DOHERTY
35 E. Wacker Dr., Suite 3500
Chicago, Illinois 60601
312/580-0935

The People of the State of Illinois were represented by the State's Attorney of Cook County.

Richard M. Daley
State's Attorney
County of Cook
Room 500 - Richard J. Daley Center
Chicago, Illinois 60602
312/443-5496

(c)

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CONSTITUTIONAL PROVISIONS

U.S. Constitution, Sixth Amendment (passim)

U.S. Constitution, Fourteenth Amendment (passim)

STATUTES

Illinois Revised Statutes, chapter 38, par. 122-1, et seq. 8

(d)

REFERENCES TO REPORTS OF OPINIONS

The Order of the Appellate Court of Illinois disposing of appeal under Illinois Supreme Court Rule 23 is not reported. A copy of the order is attached at App. A. A copy of the order denying petition for rehearing is at App. B.

The order of the Supreme Court of Illinois denying leave to appeal is not reported. It is attached at App. C.

(e)

STATEMENT OF JURISDICTIONAL GROUNDS

(i) The order and judgment of the Appellate Court was entered on May 30, 1984. A timely petition for rehearing was denied on October 9, 1984.

(ii) A timely petition for leave to appeal was denied by the Supreme Court of Illinois on February 5, 1985.

(iii) (does not apply)

(iv) Jurisdiction of this court is invoked under Title 28, U.S.C. §1257(e).

(f)

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Fourteenth Amendment:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES INVOLVED

Where applicable, they are set out in the body of this petition.

(g)

STATEMENT OF THE CASE

In 1972, petitioner pleaded guilty to murder and was sentenced to 20-40 years. No direct

appeal was taken. In 1982, petitioner filed a petition for Post-Conviction relief, supplemented by affidavits. Petitioner asserted that his sentence had been imposed in violation of his due process rights to effective assistance of counsel, and not to be sentenced on the basis of erroneous information. The State moved to dismiss, and submitted trial counsel's affidavit wherein counsel averred no recollection whether petitioner had told him of his physical condition (terminal kidney disease) prior to sentencing. The trial court granted the State's motion to dismiss, striking and dismissing the petition without an evidentiary hearing.

Petitioner alleged - and his trial counsel did not deny - that before sentencing in 1972, petitioner had told his lawyer that he had been discharged from the Marine Corps following a serious illness diagnosed by federal government physicians as terminal kidney disease, and that the trial

judge was (concededly) unaware of his physicial condition at the time of sentencing. There was verified documentation (in a letter from petitioner's State-employed treating physician) that petitioner's kidney disease was diagnosed by government physicians at Camp Pendleton. (R. 85)

(h)

RAISING THE FEDERAL QUESTIONS

The questions presented for review in this Court were presented below. The issues were addressed by the appellate court. (App. A & B) The Supreme Court of Illinois denied leave to appeal. (App. C)

(i)

REASONS FOR GRANTING THE WRIT

Ineffective assistance of counsel at sentencing is a constitutional deprivation cognizable in post-conviction proceedings. A defendant in a

criminal case has a federal and state constitutional right to counsel at all critical stages of the proceedings, including at sentencing. Mempa v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948) A claim of ineffective assistance of counsel is a claim cognizable in proceedings under the Illinois Post-Conviction Hearing Act, Illinois Revised Statutes, Chapter 38, par. 122-1, et seq. People v. Pannell, 44 Ill.App.3d 885, 358 N.E.2d 1331 (3 Dist. 1977)

The court below misapprehended petitioner's claim as raising no more than excessiveness of sentence. In its order, the appellate court stated that "alleged excessiveness of sentence is not cognizable in post-conviction proceedings." (App. A, p. 3) Petitioner's claim was based on incompetency of counsel. An allegation of incompentency of counsel has long been deemed cognizable in post-conviction proceedings, and is of

constitutional magnitude. Inasmuch as the Appellate Court operated under the mistaken belief that petitioner's claim was not "cognizable" in post-conviction proceedings, the judgment of the appellate court is in error. Extending the appellate court's reasoning in this regard, no petitioner will ever be able to raise ineffective assistance of counsel at sentencing in a post-conviction petition, as it will always be rejected as an effort to assert excessiveness of sentence. Due process violations with respect to sentencing, and ineffective assistance of counsel at sentencing, raise more than "excessiveness of sentence."

The Appellate Court erroneously implied that effective assistance of counsel at sentencing is not of constitutional magnitude. In its judgment, the appellate court stated that "the fact that a sentencing hearing might not have contained sufficient evidence upon which the court could have exercised its sentencing discretion, does not pose

a question of constitutional proportion." (App. "A", p. 3) An attorney who possesses crucial evidence in mitigation, yet who fails to present such evidence to the sentencing court, does not commit malfeasance of non-constitutional magnitude. The decisions of this Court in Mempa v. Rhay, 389 U.S .128 (1967), and Townsend v. Burke, 334 U.S. 7356 (1948), make this very clear.

There is a due process right not to be sentenced on the basis of erroneous information. This is a federally-recognized due process right. Townsend v. Burke 334 U.S. 736 (1948); United States v. Tucker, 404 U.S. 443 (1972); United States v. Harris, 558 .F2d 366 (7 Cir. 1977)

In its judgment, the appellate court concluded that "the record does not show that the trial court would have imposed a lesser sentence." (App. "A", p. 3) Petitioner submits that this conclusion overlooks the comment by the trial court when

apprised of petitioner's allegations:

> I don't see anything good having been done in that sense; he at least could have been given a minimum .... (R. 15)

More significantly, however, whether or not the trial court would have imposed a lesser sentence should not be determined by the guesswork of the appellate court. The factual allegations, undenied by the State's Motion to Dismiss, require an evidentiary hearing. People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952) In the case at bar, petitioner's allegations that at the time of sentencing he suffered from a terminal medical condition, already diagnosed as such by government doctors, not known by the sentencing court, but known by petitioner's attorney, are just such extra-record allegations as require that an evidentiary hearing be held. The "right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society." Wisconsin v. Constantineau, 400 U.S. 433, 437

(1971)

Petitioner was prejudiced by the due process violation at sentencing. As the sentencing court noted when apprised of petitioner's contentions:

> [H]ad the Court known he had a limited time to live ... he at least could have been given a minimum, [under] which he would have been out by now. (R. 15)

This commentary by the sentencing court demonstrates the prejudice to petitioner of his counsel's failure to communicate the actual facts regarding petitioner's medical condition to the court. Accord, see Osborne v. Commonwealth, 389 N.E.2d 891 (Mass. 1979), remanding for resentencing for murder some 10 years after defendant pleaded guilty, where defendant alleged that he was deprived of effective assistance of counsel, since counsel failed to bring various mitigating factors to the judge's attention -- such as his

service record in Vietnam -- mentioning only defendant's alcohol problem. Id., at 987-8.

In the case at bar, counsel merely asked for mercy, making no argument at all in mitigation. (R. 213) This inaction amounts to ineffective assistance, considering petitioner's uncontradicted and verified assertions that he told his counsel of his terminal physical condition. Where counsel does "nothing" at sentencing that amounts to ineffective assistance. Young v. Zant, 560 F. Supp. 274, 280 (M.D. Ga. 1980) Had the crucial information concerning petitioner's physical debility been communicated to the court, defendant could have been sentenced to a minimum of 14 years to 14 and a day rather than the 20 to 40 year sentence he received. Under these circumstances, petitioner was prejudiced by the due process violation at sentencing.

The trial court's summary disposition of this cause without an evidentiary hearing - where peti-

tioner's allegations were undenied, even by his trial cousnel -- was error. The appellate court's summary disposition of the constitutional issues involved was error. The judgment below should be reversed and this cause should be remanded for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, petitioner Frederick Lancaster prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

DENNIS M. DOHERTY
35 E. Wacker Dr., #3500
Chicago, Illinois 60601
312/580-0935

FREDERICK F. COHN
35 E. Wacker Dr., #3500
Chicago, Illinois 60601
312/641-0692

Counsel for Petitioner

App. A

Third Divison
May 30, 1984

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IN THE APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
vs.	)	Cook County.
FREDERICK LANCASTER,	)	Honorable Daniel J. Ryan,
Defendant-Appellant.	)	Judge Presiding

ORDER DISPOSING OF APPEAL

UNDER SUPREME COURT RULE 23

In 1972 defendant entered a negotiated guilty plea to murder based on his fatal shooting of a Chicago police officer who came upon defendant while the latter was committing a felony. In accord with the terms of the plea agreement,

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defendant was sentenced to an indeterminate term of 20 to 40 years. No direct appeal was taken. In 1982 defendant sought post-conviction relief and his release. The trial court denied relief without an evidentiary hearing. Defendant now contests the correctness of this ruling and seeks an evidenitary hearing on his petition.

The record shows less than one year before the slaying defendant, who was then in the military, was diagnosed as having a kidney ailment which would lead to kidney failure and ultimately cause his death. After his conviction he began dialysis treatments in 1974. In 1975 and 1978 he underwent unsuccessful kidney transplant operations, and now he is no longer considered a candidate for such procedure. Currently, defendant is taken from the penitentiary three times each week to a Chicago medical facility to receive dialysis treatments which last several hours.

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When defendant became eligible for parole, his request was denied. After he then unsuccessfully attempted to gain executive clemency from the governor, he filed his post-conviction petition.

In support of his petition defendant appended his own affidavit in which he asserted that he had told his counsel of his kidney condition before the guilty plea and the affidavit of that counsel that he had no recollection of being advised of defendant's kidney ailment. Defendant asserted that, if the court had been advised of his condition, perhaps a different sentence would have been given which could have already resulted in his release.

Defendant now maintains that his retained counsel at the plea hearing failed to advise the court of his critical physicial condition and such inadvertence deprived him of due process to the effective assistance of counsel. He characterizes

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his allegations as making out at least a colorable claim of a constitutional violation.

To prevail on a claim of incompetency of counsel, a defendant must show actual incompetence which materially affected the outcome of trial. (People v. Royse (1983), 99 Ill.2d 163, 168, 457 N.E.2d 1217.) Specifically, defendant argues that he had a right to have his sentence based on accurate information; that his allegations now raise questions of his counsel's competence for failure to transmit information of his medical condition to the trial court which might have affected his sentence; and that such allegations require an evidentiary hearing.

Based on Royse standard, we conclude that the trial court acted correctly in dismissing defendant's petition without an evidentiary hearing. An alleged excessiveness of sentence is not congnizable in post-conviction proceedings. (People v.

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Ballinger (1973), 53 Ill.2d 388, 390, 292 N.E.2d 400.) Further, generally the fact that a sentencing hearing might not have contained sufficient evidence upon which the court could have exercised its sentencing discretion does not pose a question of constitutional proportion. (People v. Wilbourn (1971), 48 Ill.2d 187, 190, 268 N.E.2d 148.) And, even if a possible point of constitutional import was not presented to the sentencing judge, there must be a reasonable probability that the sentence would have been less if that point had been made known. People v. Placek (1976), 43 Ill.App.3d 818, 822, 357 N.E.2d 660.

In the present case the post-conviction matter was considered by the same judge who had accepted defendant's negotiated plea a decade before. The court recalled that it had concurred on the agreed-upon sentence. Despite defendant's suggestion to the contrary, the record does not

show that the trial court would have imposed a lesser sentence. Further, this is not a case where the State or defense counsel withheld material information from the sentencing judge. At the time of sentencing defendant's kidneys apparently had not yet ceased functioning, and defendant has not established that at the time of sentencing his kidney failure was imminent. In fact, defendant was discharged by the military less than one year before he fatally shot the officer. At this point he knew of his kidney ailment, yet the record does not show that at that time dialysis was required. Rather it appears that this medical procedure was not necessary until two years after his guilty plea. Thus we do not see any basis upon which defendant's sentence might have been affected because the trial was not apprised at that time of sentence or defendant's condition. Finally, we would add that given the

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nature of defendant's offense, the negotiated sentence cannot be said to have been severe. Defendant simply did not present any matters requiring an evidentiary hearing.

Accordingly, the judgment of the circuit court is affirmed.

McNAMARA, McGILLICUDDY and WHITE, JJ.

Order

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	)	
vs.	)	No. 82 - 2019
FREDERICK LANCASTER, Petitioner-Appellant.	)	

ORDER

Upon consideration of the petition for rehearing filed on September 17, 1984, by petitioner-appellant, said petition is hereby DENIED.

Enter:

Order Entered Oct 09, 1984

_____
Justice

_____
Justice

App. C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035
February 5, 1985

Mr. Dennis M. Doherty
Attorney at Law
35 E. Wacker Dr., #3500
Chicago, IL 60601

No. 61033 - People State of Illinois, respondent,
v. Frederick Lancaster, petitioner.
Leave to appeal, Appellate Court,
First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this court will issue to the Appellat Court on February 26, 1985.